

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

LORRI GIRARD-QUICK,  
Plaintiff,  
v.  
MICHAEL J. ASTRUE,  
Commissioner of Social  
Security,  
Defendant.

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BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 14, 17.) The parties have consented to proceed before a magistrate judge. (Ct. Rec. 4.) Attorney D. James Tree represents Lorri Girard-Quick (Plaintiff); Special Assistant United States Attorney David Burdett represents the Commissioner of Social Security (Defendant). After reviewing the administrative record and the briefs filed by the parties, the court **DENIES** Plaintiff's Motion for Summary Judgment and directs entry of judgment in favor of Defendant.

Plaintiff filed for disability insurance benefits (DIB) under Title II of the Social Security Act on July 22, 2004. (Tr. 55.) She alleged disability due to carpal tunnel syndrome of the right hand and right shoulder and arm injury related problems, with an onset date April 6, 2001. (Tr. 120, 121.) Following a denial of

1 benefits and reconsideration, a hearing was held before  
2 Administrative Law Judge (ALJ) Paul Gaughen. (Tr. 46-55, 452-76.)  
3 The ALJ denied benefits; review was denied by the Appeals Council.  
4 (Tr. 12-23, 4-6.) This appeal followed. Jurisdiction is  
5 appropriate pursuant to 42 U.S.C. § 405(g).

6 **STATEMENT OF FACTS**

7 The facts of the case are detailed in the transcript of  
8 proceedings (Tr.) and are briefly summarized here. Plaintiff was 47  
9 at the time of the hearing, with a ninth-grade education. (Tr.  
10 457.) She was single and had one child. (Tr. 300.) She had work  
11 experience as a house cleaner and fruit sorter. She is right-hand  
12 dominant. Her right shoulder was injured on the job as a fruit  
13 packer, and the injury was aggravated while she was working as a  
14 housekeeper, causing pain in her right shoulder, back, arm and hand.  
15 (Tr. 458.) She had two surgeries on her shoulder after it was  
16 injured, and a successful carpal tunnel release in 2002. (Tr. 193,  
17 212.) She testified she continued to have problems with her  
18 shoulder and hands, including pain, restricted range of motion and  
19 weakened grip that caused her to drop things. She testified her  
20 left hand was beginning to give her problems also. (Tr. 460-61.)  
21 She stated she had problems sleeping and no energy four or five days  
22 per month. (Tr. 462.) She testified she cooked and cleaned the  
23 house, but these activities took her longer than they did before her  
24 injuries. (Tr. 463.)

25 **ADMINISTRATIVE DECISION**

26 The ALJ found Plaintiff's date of last insured for DIB was June  
27 30, 2005. He determined she had not engaged in substantial gainful  
28 activity since the alleged onset date through the date of last

1 insured. (Tr. 17.) At steps two and three, the ALJ found Plaintiff  
 2 had the severe impairments of "adhesive capsulitis of the right  
 3 shoulder post surgery and right side carpal tunnel syndrome by  
 4 history," but these impairments did not meet the requirements of 20  
 5 C.F.R. Part 404, Subp. P, Appendix 1 (Listings). (Tr. 17-18.) At  
 6 step four, ALJ Gaughen made the following residual functional  
 7 capacity (RFC) finding:

8 [T]hrough the date last insured, the claimant has the  
 9 residual functional capacity to perform light work, which  
 10 involved occasional lifting less than 20 pounds with her  
 11 right upper extremity, frequent lifting or carrying of 10  
 12 pounds with her right upper extremity, sitting for 6 hours  
 13 and standing/walking for 6 hours in an 8 hour workday and  
 having limited use of her right upper extremity for  
 repetitive grasping, holding and turning objects (i.e.,  
 gross manipulation) and reaching in all directions. Her  
 grip is intact with diminished strength. Her left upper  
 extremity is unrestricted.

14 (Tr. 18.) Based on the record and testimony from a vocational  
 15 expert (VE), the ALJ determined Plaintiff was unable to perform her  
 16 past relevant work. (Tr. 22.) At step five, the ALJ considered VE  
 17 testimony and record evidence and concluded Plaintiff could perform  
 18 other jobs in the national economy, such as charge account clerk  
 19 and call-out operator and, therefore, was not "disabled" as defined  
 20 by the Social Security Act. (Tr. 22-23.)

## 21 ISSUES

22 The question presented is whether there was substantial  
 23 evidence to support the ALJ's decision denying benefits and, if so,  
 24 whether that decision was based on proper legal standards.  
 25 Plaintiff asserts the ALJ erred when he (1) improperly rejected  
 26 Plaintiff's pain testimony; (2) failed to fully develop the record;  
 27 and (3) failed to meet the Commissioner's burden at step five. (Ct.  
 28 Rec. 15 at 8.)

## **STANDARD OF REVIEW**

In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001), the court set out the standard of review:

The decision of the Commissioner may be reversed only if it is not supported by substantial evidence or if it is based on legal error. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put another way, substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational interpretation, the court may not substitute its judgment for that of the Commissioner. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Soc. Sec. Admin.* 169 F.3d 595, 599 (9th Cir. 1999).

The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, although deference is owed to a reasonable construction of the applicable statutes. *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000).

## **SEQUENTIAL PROCESS**

Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the requirements necessary to establish disability:

Under the Social Security Act, individuals who are "under a disability" are eligible to receive benefits. 42 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any medically determinable physical or mental impairment" which prevents one from engaging "in any substantial gainful activity" and is expected to result in death or last "for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). Such an impairment must result from "anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. § 423(d)(3). The Act also provides that a claimant will be eligible for benefits only if his impairments "are of such severity that he is not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists in the national economy . . ." 42 U.S.C. § 423(d)(2)(A). Thus, the definition of disability consists of both medical and vocational components.

1       In evaluating whether a claimant suffers from a  
 2 disability, an ALJ must apply a five-step sequential  
 3 inquiry addressing both components of the definition,  
 4 until a question is answered affirmatively or negatively  
 5 in such a way that an ultimate determination can be made.  
 6 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The  
 7 claimant bears the burden of proving that [s]he is  
 8 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.  
 9 1999). This requires the presentation of "complete and  
 10 detailed objective medical reports of h[is] condition from  
 11 licensed medical professionals." *Id.* (citing 20 C.F.R. §§  
 12 404.1512(a)-(b), 404.1513(d)).

## DISCUSSION

### A. Credibility

1       The ALJ summarized Plaintiff's testimony and found "claimant's  
 2 statements concerning the intensity, persistence and limiting  
 3 effects of these symptoms are not entirely credible." (Tr. 20.)  
 4 Plaintiff contends the ALJ's reasons for discounting her testimony  
 5 are neither specific nor legally sufficient. She argues her pain  
 6 testimony should be credited and an immediate award of benefits  
 7 should be ordered. (Ct. Rec. 15 at 11-14, 18-19.)

8       Credibility is a factor considered in the evaluation of medical  
 9 evidence when there is inconsistency between a diagnosed condition  
 10 and a claimant's subjective complaints. *Webb v. Barnhart*, 433 F.3d  
 11 683, 688 (9<sup>th</sup> Cir. 2005).

12       An ALJ cannot be required to believe every allegation of  
 13 disabling pain, or else disability benefits would be  
 14 available for the asking, a result plainly contrary to 42  
 15 U.S.C. § 423(d)(5)(A) . . . . This holds true even where  
 16 the claimant introduces medical evidence showing that he  
 17 has an ailment reasonably expected to produce some pain;  
 18 many medical conditions produce pain not severe enough to  
 19 preclude gainful employment.

20       *Fair v. Bowen*, 885 F.2d 597, 603 (9<sup>th</sup> Cir. 1989). As explained by  
 21 the Commissioner in his policy Ruling, the ALJ need not totally  
 22 reject a claimant's statements; he may find the claimant's  
 23

1 statements about pain to be credible to a certain degree, but  
 2 discount statements based on his interpretation of evidence in the  
 3 record as a whole. *Social Security Ruling (SSR) 96-7p.*

4 For example, an adjudicator may find credible an  
 5 individual's statement that the abilities to lift and  
 6 carry are affected by symptoms, but find only partially  
 7 credible the individual's statements as to the extent of  
 the functional limitations or restrictions due to  
 symptoms; i.e., that the individual's abilities to lift  
 and carry are compromised, but not to the degree alleged.

8 *Id.*

9 The ALJ must engage in a two-step analysis in deciding whether  
 10 to admit a claimant's subjective symptom testimony. *Smolen v.*  
*11 Chater*, 80 F.3d 1273, 1281 (9<sup>th</sup> Cir. 1996). Under the first step,  
 12 the claimant must produce objective medical evidence of an  
 13 underlying "impairment," and must show that the impairment, or a  
 14 combination of impairments, could reasonably be expected to produce  
 15 pain or other symptoms. *Cotton v. Bowen*, 799 F.2d 1403, 1407 (9<sup>th</sup>  
 16 Cir. 1986). Once the *Cotton* test is met, the ALJ must evaluate the  
 17 credibility of the claimant. *Smolen*, 80 F.3d at 1281-82. If there  
 18 is no affirmative evidence of malingering, the ALJ must provide  
 19 "clear and convincing" reasons for rejecting Plaintiff's pain and/or  
 20 symptom testimony. *Rollins v. Massanari*, 261 F.3d 853, 858 (9<sup>th</sup> Cir.  
 21 2001); *Smolen*, 80 F.3d at 1283-84. The ALJ may consider the  
 22 following factors when weighing the claimant's credibility:  
 23 "[claimant's] reputation for truthfulness; inconsistencies either in  
 24 [claimant's] testimony or between [his/her] testimony and [his/her]  
 25 conduct; [claimant's] daily activities; [his/her] work record; and  
 26 testimony from physicians and third parties concerning the nature,  
 27 severity, and effect of the symptoms of which [claimant] complains."  
*Light v. Social Sec. Admin.*, 119 F.3d 789, 792 (9<sup>th</sup> Cir. 1997). If

1 the ALJ's credibility finding is supported by substantial evidence  
 2 in the record, the court may not engage in second-guessing. See  
 3 *Morgan*, 169 F.3d at 600.

4 Plaintiff appears to argue the ALJ did not meet the second  
 5 prong of the *Cotton* test, and found only that her subjective  
 6 complaints were not supported by objective evidence. This argument  
 7 is unpersuasive. After summarizing and interpreting the medical  
 8 evidence, the ALJ specifically identified Plaintiff's allegations  
 9 that she could not lift more than 40 pounds,<sup>1</sup> she drops things with  
 10 her right hand (indicating poor grip), it takes longer to do things  
 11 like puzzles and tasks, her pain caused her to lie down at  
 12 unpredictable times on bad days, and she had bad days several times  
 13 during the week. (Tr. 20.) He then found she met the first prong  
 14 of the *Cotton* test (her medically established impairments could  
 15 reasonably cause the alleged symptoms), but her statements were "not  
 16 entirely credible." To support this finding, he explained which  
 17 evidence undermined her testimony.

18 Specifically, he cited record evidence of her daily activities  
 19 (mowing the lawn, household chores, walking a mile, painting,  
 20 driving, socializing) and found these activities "were not  
 21 consistent with [her] statements." (*Id.*) This is a legally  
 22 sufficient reason for discounting credibility and is supported by  
 23 her statements to examining physician Fred Price, D.O. (Tr. 302.)

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24  
 25 <sup>1</sup> At the hearing she testified, "I used to be able to lift  
 26 quite a bit of weight, and I can't lift even 40 pounds of dog food  
 27 out of the trunk of the car anymore." She also stated some days it  
 28 was difficult to lift a gallon of milk. (Tr. 459.)

1 The ALJ gave additional reasons for not fully crediting her  
 2 statements. The reasons included personal observations of her  
 3 treating physicians: her treating physicians did not rule out all  
 4 work activities; her treating orthopedic surgeon, Thomas Kennedy,  
 5 M.D.,<sup>2</sup> opined she could lift 25 pounds and should be able to do light  
 6 work; Dr. Kennedy observed she had a "disability mind set"; in 2004,  
 7 her treating physician, Wallace Donaldson, M.D., indicated she  
 8 possibly could do cashier work; and examining orthopedic specialist  
 9 Alfred Blue, M.D., opined Plaintiff could work with shoulder  
 10 limitations. Dr. Blue also observed Plaintiff stated she could not  
 11 work, suggesting a disability mind set and secondary gain issues.  
 12 (Tr. 20, 193, 195-99, 319-21, 341, 351, 400.) These documented  
 13 observations of examining and treating physicians are legally  
 14 sufficient, "clear and convincing" reasons to discount Plaintiff's  
 15 pain testimony. *Light*, 119 F.3d at 792. The ALJ's credibility  
 16 determination was based on more than a lack of objective medical  
 17 evidence and is supported by substantial evidence.

18 **B. ALJ's Duty to Develop the Record**

19 Plaintiff asserts that remand is necessary to obtain additional  
 20 testing as recommended by her examining and treating physicians.  
 21 (Ct. Rec. 15 at 14.) Treatment notes from April 2002 by her  
 22 treating orthopedic surgeon, Dr. Kennedy, indicate a MRI showed AC  
 23 joint arthrosis and impingement syndrome of the right shoulder and  
 24 possible rotator cuff tear. Surgery was scheduled for shoulder

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25  
 26 <sup>2</sup> The opinions of medical specialists about medical issues  
 27 related to their area of speciality are given more weight than  
 28 physicians who are not specialists. 20 C.F.R. § 404.1527(d)(5).

1 decompression and, if necessary, repair of the rotator cuff tear.  
2 (Tr. 17, 212-16.) In January 2003, a second shoulder arthroscopy  
3 was performed to relieve adhesive capsulitis in the right shoulder.  
4 (Tr. 211.) In November 2003, Plaintiff saw Dr. Kennedy for a  
5 follow up of the second surgery. (Tr. 193.) Dr. Kennedy noted her  
6 shoulder surgery was well-healed, but Plaintiff continued to  
7 complain of pain in her shoulder and newly complained of recurrent  
8 hand numbness. (Tr. 193.) Dr. Kennedy reported Plaintiff's carpal  
9 tunnel release in August 2002 had had excellent results, with a  
10 complete resolution of symptoms. He recommended further physical  
11 therapy and expressed concern about secondary gain issues around her  
12 return to work. However, because of Plaintiff's new symptom  
13 complaints, he recommended an evaluation by a hand specialist. (Tr.  
14 17, 193-94.)

15 In January 2004, Dr. Donaldson referred Plaintiff to  
16 neurologist Peter Gilmore, M.D., for an evaluation of her right hand  
17 numbness. (Tr. 222.) Dr. Gilmore noted Plaintiff had had a MRI  
18 scan of her shoulder in 2002, followed by two separate surgeries.  
19 Nerve conduction tests performed by Dr. Gilmore in January 2004 were  
20 normal, with no evidence of carpal tunnel syndrome on either side.  
21 (Tr. 220-21.) Dr. Gilmore recommended a MRI scan of the cervical  
22 spine, to be ordered by Dr. Donaldson. (Tr. 219, 317.) In July  
23 2004, Dr. Donaldson reported there was continued delay in getting  
24 authorization for the recommended MRI. (Tr. 226.) Plaintiff argues  
25 the Commissioner had a duty to order an MRI because it was  
26 recommended by Dr. Gilman and Dr. Donaldson (upon Dr. Gilman's  
27 recommendation).

28 In Social Security proceedings, the burden of proof is on the

1 claimant to prove the existence of a severe impairment by providing  
2 medical evidence consisting of signs, symptoms, and laboratory  
3 findings; the claimant's own statement of symptoms alone will not  
4 suffice. 20 C.F.R. § 404.1508. As a threshold to establishing an  
5 impairment, it is the claimant's responsibility to produce  
6 sufficient objective medical evidence of underlying impairment to  
7 show that the impairment, or a combination of impairments, "could  
8 reasonably be expected to produce pain or other symptoms." *Cotton*,  
9 799 F.2d 1403.

10 Once medical evidence is provided by the claimant, the  
11 Regulations state the agency "will develop your complete medical  
12 history for at least the 12 months preceding the month in which you  
13 file your application unless there is a reason to believe that  
14 development of an earlier period is necessary." 20 C.F.R.  
15 § 404.1512 (d). An ALJ's duty to develop the record further is  
16 triggered "only when there is ambiguous evidence or when the record  
17 is inadequate for proper evaluation of evidence." *Mayes v.*  
18 *Massanari*, 276 F.3d 453, 4509-60 (9<sup>th</sup> Cir. 2001) (*citing Tonapetyan*  
19 *v. Halter*), 242 F.3d 1144, 1150 (9<sup>th</sup> Cir. 2001)). To further develop  
20 the record, the Commissioner may order consultative examinations at  
21 the agency's expense. However, the Commissioner has "broad latitude  
22 in ordering a consultative examination," *Diaz v. Secretary of Health*  
23 *and Human Services*, 898 F.2d 774, 778 (10<sup>th</sup> Cir. 1990). Consultative  
24 exams are purchased to resolve a conflict or ambiguities "if one  
25 exists." 20 C.F.R. § 404.1519a(2). There must be sufficient  
26 objective evidence in the record to suggest the "existence of a  
27 condition which could have a material impact on the disability  
28 decision." *Hawkins v. Chater*, 113 F.3d 1162, 1167 (10<sup>th</sup> Cir. 1997.)

1       Here, there are neither ambiguities nor conflicts in the  
2 medical evidence regarding Plaintiff's history and complaints of  
3 carpal tunnel syndrome. Further, the record contains evidence that  
4 Plaintiff was seen by specialists, as recommended by Dr. Kennedy.  
5 Specifically, Plaintiff was sent to an orthopedic hand surgeon, Dr.  
6 Blue, for evaluation and recommendation in May 2004, after she was  
7 referred to Dr. Gilmore.<sup>3</sup> (Tr. 314-21.) Dr. Blue reviewed the entire  
8 record and personally examined Plaintiff. He found no significant  
9 limitations in Plaintiff's gripping during rapid, repeat gripping  
10 tests. (Tr. 319.) Contrary to Dr. Gilmore's suggestion in January  
11 2004, Dr. Blue concluded no further testing was needed, stating that  
12 further imaging "may find some abnormalities but the neurological  
13 examinations do not show any objective evidence of a nerve root  
14 compression." (Tr. 320.) Dr. Blue accepted the diagnoses of right  
15 shoulder sprain and bilateral carpal tunnel syndrome, but noted  
16 symptom magnification in the examination and Dr. Kennedy's concerns  
17 regarding secondary gain. He concluded the right shoulder had  
18 reached maximum improvement and "the carpal tunnel syndrome which  
19 has been previously accepted are [sic] clinically not present nor  
20 with an EMG/nerve conduction study." (Tr. 319-20.) Regarding  
21 Plaintiff's ability to return to work, the hand specialist stated:  
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23       <sup>3</sup> On independent review, it is noted that neurologist Dr.  
24 Gilmore saw Plaintiff two times, once for evaluation and once for  
25 nerve conduction tests. (Tr. 219-24). Therefore, he is considered  
26 an examining physician, whose opinions are given less weight than  
27 those of Dr. Kennedy, a treating specialist. *Lester v. Chater*, 81  
28 F.3d 821, 830 (9<sup>th</sup> Cir. 1995).

1 "The restriction of returning the patient to work is the patient's  
2 own conviction of disability and the patient's limited education."  
3 (*Id.*) Dr. Blue also evaluated possible jobs that Plaintiff could  
4 perform and, based on objective findings, opined Plaintiff could  
5 perform work that did not require overhead work or complete shoulder  
6 work. He also noted, "Based on [Plaintiff's] conviction she would  
7 not be able to do any of the jobs." (Tr. 321.) In June 2004, Dr.  
8 Blue was requested to re-evaluate the jobs based solely on objective  
9 findings. (Tr. 357.) His responsive second set of job analyses  
10 indicated Plaintiff was capable of performing work as a photo  
11 technician, photographer, customer service representative, and  
12 restaurant hostess. (Tr. 358-61.)

13 In August 2005 (after Plaintiff's period of disability  
14 expired), Plaintiff was examined again by orthopedic surgeon, David  
15 Whitney, M.D. (Tr. 362-70.) Plaintiff was complaining of numbness  
16 and tingling in both hands and pain and stiffness in the right  
17 shoulder. (Tr. 363.) After an interview and detailed review of  
18 the records, Dr. Whitney conducted a complete exam. He noted lack  
19 of full effort bilaterally with grip testing, no evidence of  
20 impingement of the right shoulder, and normal "two-point  
21 discrimination of both hands." (Tr. 368.) Based on his examination  
22 and prior repeat nerve conduction tests, he found no evidence of  
23 permanent partial impairment of either wrist or hand. (Tr. 369.)  
24 He opined no further testing was needed. (Tr. 367-69.) He also  
25 questioned the validity of right shoulder limitations demonstrated  
26 by Plaintiff during the examination. (Tr. 370.)

27 The ALJ did not err in relying on the orthopedic specialists  
28 consulted after Dr. Kennedy recommended Plaintiff be referred to a

1 hand specialist. It is within the Commissioner's authority to  
2 determine how to resolve conflicting medical issues. Further, it  
3 was reasonable for the ALJ to rely on the opinions of Drs. Kennedy  
4 Blue and Whitney, all of whom were orthopedic specialists, in his  
5 consideration of the evidence and final determination. The fact  
6 that Dr. Gilmore suggested a MRI where nerve conduction tests  
7 revealed no carpal tunnel syndrome, does not warrant more weight  
8 than the opinion of Dr. Kennedy, that Plaintiff should consult with  
9 a hand surgeon, and the opinions of examining orthopedic  
10 specialists, that no further testing was needed to properly evaluate  
11 Plaintiff's hand condition. See 20 C.F.R. § 404.1527(d)(5) (more  
12 weight given to opinions of specialist about issues related to  
13 his/her area of speciality).

14 The ALJ's resolution of the conflicting medical opinions  
15 regarding the need for additional testing is reasonable and fully  
16 supported by the record. The ALJ did not have a duty to order an  
17 additional MRI.

18 **C. Step Five: Hypothetical Question**

19 At step five, the burden shifts to the Commissioner to show  
20 that (1) the claimant can perform other substantial gainful  
21 activity; and (2) a "significant number of jobs exist in the  
22 national economy" which claimant can perform. *Kail v. Heckler*, 722  
23 F.2d 1496, 1498 (9<sup>th</sup> Cir. 1984). At step five, the hypothetical posed  
24 to the VE must accurately reflect the claimant's impairments.  
25 *Embrey v. Bowen*, 849 F.2d 418, 423 (9<sup>th</sup> Cir. 1988); *DeLorme v.*  
26 *Sullivan*, 924 F.2d 841, 850 (9th Cir. 1990). Plaintiff argues the  
27 ALJ erred when he presented a hypothetical question to the VE that  
28 did not include Plaintiff's need for unscheduled breaks and problems

1 carrying things without dropping them. (Ct. Rec. 15 at 18.)  
2 However, an ALJ does not have to accept as true the limitations  
3 propounded by a claimant's counsel if those limitations are not  
4 supported by the record. *Martinez v. Heckler*, 807 F.2d 771 (9<sup>th</sup> Cir.  
5 1986); see *Osenbrock v. Apfel*, 240 F.3d 1157, 1163-64 (9<sup>th</sup> Cir.  
6 2001).

7 The hypothetical posed to the VE is as follows:

8 Her last grade in school was the ninth. There are no  
9 mental health limitations. The individual is right  
10 handed. Now you should know that sitting, standing and  
11 walking, and performing basic work activities are  
12 essentially unrestricted. Bending, stooping, kneeling can  
13 be done at least occasionally. Use of the nondominant  
14 left upper extremity is essentially unrestricted. But  
15 there are restrictions post surgically on the dominant  
16 right arm as follows. With that arm she could frequently  
17 lift or carry no more than 10 pounds, or occasionally  
18 handle on the right upper extremity no more than about 20  
19 pounds. But she has limited reaching overhead and, and  
20 generally in all directions with the right upper  
21 extremity. And you should also assume that while range of  
22 motion of the right wrist is intact, she would present at  
23 work with some diminished gripping strength on the right.  
24 She may even drop things from time to time with occasional  
25 use of the right hand. With regard to her vision and  
26 hearing, there are no restrictions. That is intact and  
27 normal.

28 (Tr. 465-66.)

29 The VE testified in detail that the hypothetical individual  
30 could perform two specific jobs that existed in significant numbers  
31 in the national economy, and as listed in the DICTIONARY OF OCCUPATIONAL  
32 TITLES (DICOT): charge account clerk and call-out operator. (Tr.  
33 467.) He also testified there were other identifiable jobs, but the  
34 ALJ considered these two jobs sufficient for step five purposes.  
35 (*Id.*) One occupation that exists in the national economy is  
36 sufficient to support a finding that a claimant is not disabled. 20  
37 C.F.R. §§ 404.1566(b). During his testimony, the VE specifically

1 referenced the DICOT definitions and opined as to how the jobs were  
 2 typically performed. (Tr. 468-69); See *Osenbrock*, 240 F.3d at  
 3 1164-65; *SSR* 00-4p. In response to the representative's  
 4 questioning, the VE opined the hypothetical individual could perform  
 5 the call-out operator job even if it required finger and manual  
 6 dexterity for computer work. (Tr. 470.)

7 There is no evidence, other than Plaintiff's self-report, that  
 8 Plaintiff needed unscheduled rest periods and had problems carrying  
 9 objects with her right hand. As discussed above, the ALJ gave  
 10 "clear and convincing reasons" for discounting Plaintiff's  
 11 allegations of disabling pain and fatigue, including her need to lie  
 12 down at unpredictable times during the day and that she drops things  
 13 when carrying them on her right side. (Tr. 20.) As stated in the  
 14 ALJ's findings, her treating and examining physicians, including  
 15 orthopedic specialists, opined she could perform light work with  
 16 right shoulder restrictions. (*Id.*; Tr. 195, 304-05, 321, 368-95.)  
 17 These opinions were based on objective findings, physician  
 18 observations and physical exam.<sup>4</sup> The record in its entirety does not  
 19 support additional limitations propounded by Plaintiff's  
 20 representative; therefore, the ALJ did not err in excluding them  
 21 from his hypothetical. The ALJ properly relied on VE testimony  
 22

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23       <sup>4</sup> Plaintiff's objections to weight given Dr. Fred Price's  
 24 examining opinion are based on the physician's misstatement  
 25 regarding the number of MRI's in the record. (Ct. Rec. 15 at 15;  
 26 Tr. 299.) However, Dr. Price's final opinions are supported amply  
 27 by his thorough physical examination, range of motion testing, and  
 28 report and by other medical evidence in the record. (Tr. 298-309.)

1 because the hypothetical included all limitations supported by the  
 2 record.

3 It is well settled that the ALJ is "responsible for determining  
 4 credibility, resolving conflicts in medical testimony and for  
 5 resolving ambiguities," in these proceedings. *Richardson*, 402 U.S.  
 6 at 400; *Andrews*, 53 F.3d at 1039; *SSR* 96-8p. Where, as here, the  
 7 ALJ's determination is a rational interpretation of the evidence in  
 8 its entirety, the court may not substitute its judgment for that of  
 9 the Commissioner. *Tackett*, 180 F.3d at 1097; *Curry v. Sullivan*,  
 10 925, F.2d 1127, 1131 (9<sup>th</sup> Cir. 1990).

11 **CONCLUSION**

12 The ALJ's findings are supported by substantial evidence and  
 13 free of legal error. Accordingly,

14 **IT IS ORDERED:**

15 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 14**) is  
 16 **DENIED**.

17 2. Defendant's Motion for Summary Judgment dismissal (**Ct.**  
 18 **Rec. 17**) is **GRANTED**.

19 3. The District Court Executive is directed to file this  
 20 Order and provide a copy to counsel for Plaintiff and Defendant.  
 21 The file shall be **CLOSED** and judgment entered for Defendant.

22 DATED January 8, 2009.

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S/ CYNTHIA IMBROGNO  
 25 UNITED STATES MAGISTRATE JUDGE  
 26  
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 28